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THE LEAGUE OF NATIONS AND THE CONSTITUTION.

Much has been said for and against the *expediency* of America entering into the proposed League of Nations. With respect to this question, this Journal is content to leave the decision with the people and those who are called upon, as their representatives, to determine such issues. But when the argument is made that the United States *cannot* enter into such a League, even if it wished to do so, because of some Constitutional obstacles that stand in the way, we feel that we are under obligations to correct any false impressions on a subject of such great importance.

When one speaks of limitations on the treaty-making power of the United States, it is usual to open one's argument with the quotation, now classic, from the opinion of Justice Field in De Geofrey v. Riggs, 133 U. S. 258:

"The treaty-making power, as expressed in the Constitution is, in terms, unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter without its consent."

It must be borne in mind that the treaty-making power is an attribute of sovereignty and without this power or to the extent that this power is limited either by foreign compulsion or self-imposed restrictions, the nation is deprived of its sovereignty. It is hardly thinkable that those who framed the Constitution had in mind any purpose then to shackle the sovereign powers of the federal government to the extent contended for by many opponents of the League of Nations.

A treaty does not have *any* effect on the *powers* of the government except voluntarily to limit their exercise in certain cases. We must bear in mind that, being *sui juris*, a nation can break its treaty obligations just like an adult may break its contract. While it is true that a treaty is the supreme law of the land, it has nevertheless no greater authority than an Act of Congress, which is also the supreme law of the land, and it has been held, in not a few cases, that if a treaty conflicts with a subsequent Act of Congress, the latter controls. Taylor v. Morton, 2 Curt. (N. S.) 454; Fong Yue Ting v. U. S., 149 U. S. 698; Head Money Cases, 112 U. S. 580; Ropes v. Clinch, 8 Blatchf. (U. S.) 309. Chinese Exclusion Case, 130 U. S. 600. In such cases, both the treaty and the Act of Congress are representative of the sovereignty of the United States. The one makes the promise; the other breaks it. We are not now discussing the ethics of the transaction, but the legal effect of it.

Now, let us take up some of the Constitutional (sic) objections to the League of Nations covenant. One of these is to Art. VI and is well stated by Mr. Charles Leach in 64 Ohio Law Bulletin, p. 230 (June 30, 1919). He says:

"Article VI of the covenant provides that the expenses of the secretariat shall be borne by the members of the league. Suppose that the covenant is signed by the president and ratified by the senate; this will call for expenditures from the treasury of the United States. Now, Art. 1, Sec. 9, of the Constitution of the United States provides that 'No money shall be drawn from the treasury, but in consequences of appropriations made by the law.' And, as we all know, no law can be passed without the concurrence of the house of representatives; remembering that the house is not

consulted, can the president and senate bind the house, in which all bills for raising revenue must originate?"

In answer to Mr. Leach's last query, we respectfully reply that, without doubt, the President can, by treaty, bind the House of Representatives and even the people, in the respect suggested. The President and the Senate under the Constitution have full authority to make whatever promise they wish to make on behalf of the government of the United States. Congress, on the other hand, is at perfect liberty to violate the promise thus made, accepting whatever consequences may follow from such a breach of plighted faith. In other words, the President and the Senate may pledge the word of the United States to some stipulation; Congress, may by Act or Resolution, refuse later to comply; in both cases the United States is acting through its proper representatives in making and breaking a promise.

Again, it has been contended that Art. VII provides for the reduction of armaments to certain fixed limits "which shall not be exceeded without the concurrence of the council." It is said that this conflicts with Art. I, Sec. 8, of the Constitution, which provides that "Congress shall have power to raise and support armies" and also to "provide and maintain a navy." It is therefore argued that the effect of Article VIII of the League Covenant is to amend the Constitution. For the same reasons given in the preceding paragraph, this contention is clearly untenable. In the first place no treaty can *amend* the Constitution nor deprive Congress of any of its powers. A treaty being merely a contract by the government, Article VIII undertakes simply to pledge Congress to exercise its power "to raise armies" and "provide a navy" in such a way as to limit the men and ships to a number agreed upon. Since treaties are necessary between civilized nations and since someone must be given the power to make such treaties for each nation, every nation is bound by the promises of those who are properly accredited as the treaty-making agents of the nation. And if a nation wishes to continue as a nation *sui juris* among the nations of the world, such promises when properly ratified must be morally binding on all branches of the government. In the United States the President is the special agent to make a promise and this promise, when ratified by the Senate, becomes the promise of the people of the United States.

It has also been alleged that Article XII of the League Covenant under which the United States "agrees in no case to resort to war until three months after the review by arbitrations," etc., is an infringement upon the Constitutional power of Congress "to declare war." If this objection is tenable, then many of the most recent treaties entered into by the United States with other nations are null and void; and it should be the duty of Congress to notify the other high contracting parties of the spurious character of our promises in this regard.

There is hardly a single treaty entered into which does not, in some sense or another, restrict the powers of Congress to act in certain cases. Many arbitration treaties pledge the word of the United States not to declare war until after a certain time has elapsed or to submit certain claims called "justiciable" to arbitration. Such international arrangements as the Universal Postal Union, to which the United States is a party and a contributor to its expense budget, would be impossible if there were not lodged somewhere in this country power to bind Congress by a promise to pay such expenses.

The treaty-making power of the United States is like the war powers of Congress, in a way superior to all others, principally because these powers are so general in their nature and so vital to the best interests of the country that it would not be wise to impose any limitations upon their exercise. One of the weaknesses of the Confedera-

tion was in the limitations upon the treaty-making power of the United States. This defect the framers of the Constitution were determined to remedy. In defense of the great powers conferred on the President and the Senate to make treaties, Alexander Hamilton wisely argued that the treaty-making power "ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."

NOTES OF IMPORTANT DECISIONS.

WAIVER OF BY-LAWS REGULATING CONDUCT OF MEMBERS OF BENEFIT SOCIETIES AND THOSE LIMITING THEIR SUBSTANTIVE RIGHTS.—A waiver is a relinquishment of known rights; it does not create rights. If this distinction is carefully borne in mind it will help to solve many perplexing situations and avoid some erroneous decisions. An example of the failure to recognize this distinction is seen in the recent case of Ceresia v. St. Giuseppe Mutual Working Men's Assn., 211 S. W. Rep. 80.

In the Ceresia case it appears that the plaintiff was a member of the defendant association, a mutual insurance organization. The by-laws provided for a sick benefit of five dollars a week for a period not exceeding six consecutive months. Another by-law provided that a member would not be entitled to sick benefits while absent from the city. Other by-laws regulate the payment of dues and the form of proofs to be made for sick and death benefits.

The plaintiff went to Italy and while there sent in a claim for a sick benefit for illness covering a period of six months during his residence in Italy. The defendant's president, out of a desire to contribute something to a fellow member's necessity, wrote plaintiff that he would try to get him a special "donation" from the society and told him to get a certificate from his local doctor in Italy of the nature and extent of his illness. Plaintiff complied with defendant's president's request, and on receipt thereof the "Executive Committee" voted a "donation" of thirty dollars. On his return from Italy defendant filed a claim for six months' sick benefits and alleged a waiver of the by-law regarding residence in the city. He recovered judgment in the trial court and the judgment is affirmed by the Missouri Court of Appeals. In its opinion, the court said:

"It is the settled law of this state that rules of waiver of forfeiture are as applicable to these society insurance companies or associations as to any ordinary insurance company, and that such a society, through its proper officers, could waive a strict compliance with the by-laws as could any insurance company. McMahon v. Supreme Tent Knights of the Maccabees, 151 Mo. 522, loc. cit. 537, 52 S. W. 384. It is further held that if the society recognizes the continuing existence of a contract by requiring proofs of claim which are furnished by the member or his beneficiary at some trouble or expense, the right to defend on account of previously known grounds of avoidance or forfeiture is lost. See Keys v. Knights and Ladies of Security, 174 Mo. App. 671, 161 S. W. 345. See, also, 29 Cyc. 198, par. f."

It is easy to see wherein the court lost its way in this case. There can be no doubt that if the right alleged to be waived arose out of any defect in the "proofs of claim" furnished the member, there was undoubtedly a waiver on the part of the company in requesting proof of loss to be made in the manner suggested by the president. But the waiver here is not of proofs of loss, but of a by-law which limits the right of recovery of sick benefits to residents only. This by-law had nothing to do with the conduct of the member but with his substantive rights under the contract which could not be enlarged by waiver.

The very decision relied upon by the court (McMahon v. Knights of Maccabees, 151 Mo. 522) is very clear in regard to the distinction between waiver of the society's rights with respect to the conduct or misconduct of a member and a waiver of those by-laws which define the substantive rights of the members. In the McMahon decision, the court held that "a member of any such society is presumed to know its laws and the contract of insurance is to be construed as having been made *under the limitation of these laws.*" Those by-laws of the society which limit the amount of a claim and the conditions under which it is granted, of course, cannot be waived. They constitute a contract between the parties which only the members themselves can change by amending the by-laws. Thus, it would not seriously be contended that the president of a society could bind the society by offering to allow a member twice, or three times the amount of the benefit allowed by the by-laws. For the same reason the president in the Ceresia case had no au-

thority, even if he had tried to do so, to offer to pay a claim which, under the by-laws, was distinctly disallowed. Such a by-law, limiting the substantive rights of the members, is quite distinct from those by-laws which regulate the conduct of the member and which *by the general conduct of the society itself* can no doubt be waived, such as by-laws which regulate the duties of the members and which do not enlarge or diminish their substantive rights, such as those regulating the time and manner of paying dues and making out proofs of loss. Such by-laws are purely remedial in their nature, and may be waived.

ENJOINING THE ENFORCEMENT OF THE WARTIME PROHIBITION ACT.—The public is agitated by the confusion attending the going into effect of the Wartime Prohibition Act. This law was passed to conserve grain, cereals, fruit and other food products used in manufacture of beer, wine and other intoxicating liquors. The act was to go into effect on July 1, 1919, and to continue until "the conclusion of the present war and thereafter until the termination of demobilization." As neither of the conditions under which the act is to cease to be effective have yet occurred, the Attorney-General is undoubtedly correct in his opinion that the President cannot prevent the law's operation without first announcing the conclusion of the war and the demobilization of the army.

The Attorney-General, however, gave some questionable encouragement to the dramshop keepers by declaring his adherence to a recent decision of the United States Circuit Court of Appeals for the Second Circuit. The declaration was construed by the press to mean that the sale of beer or light wines containing less than 2.75 per cent of alcohol would be permitted. The decision in question gives no justification for this hope and other federal courts have properly declared that dramshop keepers will continue to sell beer at the risk of being held responsible under the act.

The case referred to was that of Jacob Hoffman Brewing Co. v. McElligott, reported in 61 N. Y. L. J. 1113. In this decision the court holds that the District Attorney cannot be enjoined from prosecuting complainants for selling intoxicating liquors under the act. The opinion goes into a lengthy discussion of the power of a court of equity to enjoin criminal proceeding, and properly concludes that this right is wholly dependent on the question whether the act which authorizes such proceedings is itself constitutional or not: if constitutional, there can be no injunction; if unconstitutional, an injunction may issue under proper circumstances. Since the court held the act to be constitutional as a war measure, the part of the order of the lower court restraining criminal proceedings under the act was stricken out. The court, on the other hand, refused to declare as a matter of law that 2.75 per cent beer was not intoxicating. Here is all of that part of the opinion dealing with this question:

"The Act of November 21, 1918, is a war measure, constitutional as such and by its express terms is to continue in force until a time which has not yet been reached, i. e., the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. Until such time it is the duty of the United States Attorney, defendant, under Section 771, United States Revised Statutes, to prosecute all delinquents for crimes and offenses covered by it.

"The sole ground upon which the United States Attorney, defendant in this case, is charged with transcending his authority is that he erroneously construes the statute in connection with the complainant's product, viz., as prohibiting the use of food products in the manufacture of any beer for beverage purposes after May 1, 1919, and the sale of such beer after June 30, 1919, whereas the act properly construed prohibits only the manufacture and sale of such beer as is intoxicating, which the complainants' beer, containing not more than 2.75 per cent of alcohol by weight, is not.

"Although we concur in the construction of the statute by the court below and assume that the United States Attorney will institute criminal proceedings, we do not think the court had power to stay him by injunction from doing so. The proper place for determining whether such criminal proceedings are maintainable is not in a court of equity, but upon an indictment tried in a criminal court before a jury. For any error then committed there will be an adequate remedy by writ of error. We recognize the importance of the interests at stake that the complainants and others in like case, if not content to manufacture beer containing an alcoholic content not equaling or exceeding one-half of 1 per cent by volume, must choose between discontinuing their business or carrying it on at the risk of punishment under the Act of November 21, 1918, if they continue after May 1, 1919, to manufacture and after June 30, 1919, to sell beer containing not more than 2.75 per cent of alcohol by weight. The question, however, is not one of convenience or of discretion, but of the power of the court, and we think such an extension of judicial power, to meet what seems to be a hard case, to the domain of the executive department and of the courts of common law, would be an injury to our system of jurisprudence still more serious."

TAXATION FOR FEDERAL PURPOSES.

Taxation for Federal purposes has touched the bank account of the average, substantial citizen, and this has impelled him to think about the big subject of national finance. There is probably not a precinct in the United States where this question is not discussed by the average voter. The reverse was true five years ago.

There seems to be a feeling that the present system is inadequate, and to remedy the defect, this suggestion has been made: Amend the Constitution of the United States by repealing or changing the provisions therein prohibiting capitation and direct taxes.

This change will permit a direct tax on real and personal taxable property, for Federal purposes, to be levied and collected (in peace and war) in connection with state and municipal taxes.

It is indeed a wonder and humiliation that this change was not brought about fifty years ago. If we strike out the capitation and direct tax clauses, and authorize a general tax on property, Congress, having before it the assessed valuation, and the amount necessary to be raised, could provide money for any emergency, by making a levy. Such levy could be made, figuratively speaking, in five minutes. The proceeding would be just as simple and short as the proceedings of a school board or a board of county commissioners making a levy for the ensuing year. This Federal tax would go on to the tax books like county, school and municipal taxes, and would be collected by the county treasurer in the same manner. The expense would be nominal, instead of over $10,000,000.00. Instead of an army of tax collectors now consisting of about nine thousand men, a nominal force only, would be required.

This plan of Federal revenue would be fixed and permanent, ready to be put in operation at any time by Congressional levy.

Aside from the appealing simplicity and practicability of the plan, a convincing way to sustain this suggestion, coming from the average voter, is: To state the facts as to the origin of the capitation and direct tax provisions. It has been historically and judicially determined that there were two reasons why they were adopted: First, to protect the slave and plantation owners from a tax that would destroy slavery; second, to avoid a possible unjust tax against states through taxation of land by the acre, or according to value, many states having at that time within their practically unknown boundaries, vast tracts of unsurveyed land of little or at least unknown value.

Slavery was abolished over fifty years ago, and every foot of land, figuratively speaking, is now surveyed and on the assessment roll at a fixed value.

Overstatement is a common offense, but it would be almost fair to say, that since the removal of the reason for these direct tax clauses, they have served an evil and destructive purpose—have been to the constitution as a rotten absorbing tooth is to the human system. These clauses in the Constitution have been a bar against the establishment of a fixed and dependable system or plan of raising revenue for federal purposes. Every exigency or change of internal conditions has called for a new "Revenue Law." And the same policy must continue unless the Constitution is changed in this respect.

Here is a partial list of past revenue measures: Act of Congress, July 14, 1798; Act of Congress, Aug. 7, 1813; Act of Congress, Jan. 19, 1815; Act of Congress, Feb., 1815; Act of Congress, March 5, 1816;

Act of Congress, Aug. 5, 1861; Act of Congress, June 7, 1862; Revenue Law, 1888; Revenue Law, 1913; Revenue Law, 1916; Revenue Law, 1917; Revenue Law, 1918-19.

The pendency of every revenue measure provokes unsettled and interrupted conditions in every line of business of incalculable harm to the general welfare; and the framing and passage of these laws, each time, requires from two to about seven months. The debates attending the consideration of these measures display the versatility of the human mind and are very interesting, but the expense is unnecessary.

The excise feature of the 1918-19 revenue law, for instance, is wholly arbitrary. If a laborer, eating his lunch on a mortar box, is taxed on a thermos bottle, containing his coffee, why should he not pay on the coffee pot that it was boiled in; if his wife is taxed on talc powder for the baby, why not on *napkins* for the baby (both equally essential); if the foot pad is taxed one hundred per cent on a brass knuckle (1918-19 law), he ought to be prohibited by law from using a coupling pin, or other thing not taxed, for criminal purposes; if a tax on insurance policy, why not on meal tickets?

Illustration might be carried on without end. But it is not necessary. The point is, that no living statesman, or group of statesmen, can make such a law without being arbitrary and unjust. The inherent nature of the plan is such that it cannot be based on equity. The law is there because members of Congress had to raise the money in some way.

The system is wasteful. Every time the nation's pulse beats, a new law is necessary. And each time the situation is attended with business suspense and re-adjustment, and re-organization as to the system and plan of collection.

On Dec. 1, 1917, W. G. McAdoo transmitted a letter to the House of Representatives, stating the appropriation necessary for expenses in collecting revenue under the law up to June 30, 1919. The amount was $10,224,627.68. The number of men employed to do this work was 6709. Under the 1918-19 revenue law it will probably require $15,000,000.00, and about 9000 men.

The burden on the business of the country, in the way of extra bookkeeping, accounting, returns, reports touching revenue on drugs, stocks, admission tickets, railroad tickets, documents, etc., is stupendous and unbearable. Hundreds of millions of dollars, not accruing to the government, are spent in this way—an extra and unnecessary expense.

It is not argued that this direct tax plan should be made the exclusive source of Federal revenue. Possibly certain excise taxes, and income tax, and tariff for revenue and economic purposes, might be properly retained. But the main, steady and permanent source should be the direct tax plan.

For thirty years the sheriff of Cherry County, Nebraska, drove about 90 miles each year to personally notify a man to come to the County seat to serve as a juror in the District Court. Six or eight years ago, someone, who could see the humor and travesty of the thing, wrote to members of the Legislature suggesting a law for notifying jurors by registered mail. This was promptly done. It is claimed that this tax proposition is just as simple. And the obvious and crying necessity of the change is hardly debatable.

The history of the litigation touching the subject of direct taxes is full of interest and is fully discussed in the cases cited in the note hereto.[1]

(1) The leading cases are: Hylton v. U. S., 3 Dallas 171 (1796); Pacific Ins. Co. v. Soule, 7 Wall. 433 (1868); Veazie Bank v. Fenne, 8 Wall. 533 (1869); Springer v. U. S., 23 Wall. 586 (1880); Pollock v. Farmers, etc., 158 U. S. 601 (rehearing, 1895).

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GOVERNMENTAL FUNCTION OF MUNICIPALITY—LIABILITY FOR TORT.

In monarchies the king "can do no wrong," and in representative governments the people are themselves the government, and from these facts has grown up the doctrine that no subject can sue the government for an injury or wrong suffered, unless the government permits him so to do.

Under our form of government, this could be done by constitutional provision or by legislative action. Yet in Ohio, where such right was granted by constitutional provision, it has not been enforced against the state because the legislature has passed no law providing for the same.

As a general doctrine it may be said municipal corporations are agencies of the state, having delegated to them certain governmental powers, and while in the exercise of such powers, no right of action exists against the municipality, for redress of any wrong suffered unless power so to do has been clearly granted. The mere fact that the municipality has power to sue and may itself be sued is not sufficient. Courts have time and again recognized the difficulty of determining the distinction between the public or governmental duties, for the negligent performance of which the corporation is not liable, and the private or ministerial duties, for the negligent performance of which it is liable.

A federal court has given the following:

"Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Private or corporate powers are those which the city is authorized to execute for its own emolument, or from which it derives special advantage, or from the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the government for the universal benefit."[1]

However, though it may be difficult to always draw the distinction,

"when the line is ascertained, it is not difficult to determine the right of the parties, for the rules of law are clear and explicit which establish the rights, immunities and liabilities of the city when in the exercise of each class of powers. All that can be done probably with safety is to determine each case as it arises, under which class it falls."[2]

Fire Department.—It has been broadly held that

"a municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department, or any of its members; nor is it liable for negligence in omitting to inform the members of its fire department of defects in the apparatus of the department, known to itself; nor for neglecting to instruct its fire department in the proper use and management of such apparatus."[3]

In this case the city of Columbus having purchased a certain apparatus for the extinguishment of fires called a "fire tower," its fire department was engaged in a practice drill in one of its principal streets, when by the negligent management of the members of the fire department it fell and caused the death of a person who was sitting in his buggy near by and was without fault on his part in any way contributing to the result.

In another case it was held:

"The power conferred by the statute, on cities of this state, to organize and regulate fire companies, and provide engines, etc., for extinguishing fires, is, in its nature, legislative and governmental; and a city is

(1) Hart v. Bridgeport, 11 Fed. Cas. No. 6, 149, 13 Blatchf. 289.
(2) Lloyd v. Major, etc., 5 N. Y. 374.
(3) Frederick v. City of Columbus, 58 O. S. 538.

not liable to individuals for damage resulting from failure to provide the necessary agencies for extinguishing fires, or from the negligence of officers or other persons connected with the fire department."[4]

In this case suit was brought against the city because of loss of property by fire, alleging that it was the result of failure on the part of the city to provide proper cisterns and suitable engines, etc., and that the members of the fire department had not properly performed their duties.

Fire Works.—Where the statute permitted the municipality to use a certain amount of money for the celebration of holidays, and a person was injured through the negligence of one of the servants of the city in discharging the fire works, the city was held not liable.[5]

Mob Violence.—Although it may be provided by the charter of a municipality that "it shall be the duty of the council to regulate the police of the city, preserve the peace, prevent disturbances and disorderly assemblages, yet the municipality cannot be held responsible, under an averment in the petition, that the officers of the city negligently suffered and permitted riotous persons assembled to damage and destroy plaintiff's property."

In the decision so holding it is said:

"It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state—discharging duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of inlividuals. As to the first, responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power: as to the second, the rules which govern the responsibility of individuals are properly applicable."[6]

Injury of Guard in Workhouse.—When a person was employed as a guard in a city workhouse and was injured by the explosion of some percussion caps that were used in the attached stone quarry, it was held he could not recover.

In deciding this case the court makes use of this language:

"In the execution of the powers conferred as to workhouses, and the performance of the duties imposed in caring for persons sentenced to perform labor therein, the municipal corporation is an agency of the sovereign state, in aid of the preservation of order and the punishment of offenders against the laws of the state and the ordinances of the corporation. Through such agency and others the state seeks to carry on its system of government and enforce the laws and to this end it has liberally parceled out its powers to municipal corporations as the most successful means of securing good government to the people."[7]

Convict in Workhouse.—So when the claim was that the plaintiff was injured by being confined in a dangerous, unhealthy and unsanitary dungeon of a workhouse, he could not recover.[8]

Firing Cannon in Street.—In a case where a person was injured while passing along the street of a city, by a cannon fired by some persons to him unknown, he could not recover.

"An assembly of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one of such discharges: *Held*, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision and control of the streets, 'and shall cause

(4) Wheeler v. City of Cincinnati, 19 O. S. p. 19.

(5) Tindley v. Salem, 137 Mass. 171.

(6) Western College v. City of Cleveland, 12 O. S. 377.

(7) Bell v. City, 80 O. S. 19; Green v. Muskingum Co., 23 O. C. C. 43.

(8) Rose v. Toledo, 22 O. C. C. 540.

the same to be kept open and in repair and free from nuisance' (Rev. Stat. No. 2640), and it will make no difference that the authorities of such corporation, with knowledge of such firing, took no steps to prevent the same."[9]

Struck on Street by Bicycle.—A municipal corporation which has merely failed to pass an ordinance forbidding bicycles to be ridden over a sidewalk of the city, not having in any way authorized it, is not liable to a person walking on the sidewalk, from injuries resulting from being run into and thrown down by a bicycle.[10] Nor is the city liable because its police officers suffer the act to be done.[11]

Injured By Person Coasting, Etc.—Where the injury resulting from being struck by a person coasting, if it did not result from a defective condition of the street, and merely came from an unlawful or improper use of the street, the municipality is not liable.[12] It is generally held that the suppression of coasting in a public highway is a police duty, and for non-performance of such duty by its officers and agents, the corporation is not liable.

Failure to Enforce Ordinance as to Oil Storage.—No action can be maintained against a municipality, from the fact that it failed to enforce an ordinance governing and controlling the storage of oils within its corporation limits, and escaping oil set fire to an adjoining lumber yard.[13]

Employee Injured While Removing Ashes.—While there is a conflict of authority as to whether or not the removal of ashes from residences of citizens is an act of the municipality in its governmental capacity, the weight of authority seems to be that it is.[14]

A distinction seems to be made in cases where the municipality acts under a general police power, and where it acts under a statutory duty to keep its streets clean and free from nuisance. In the latter instance it may be liable.[15]

Construction of Fire Engine Houses.—Where a municipality constructs a public building, and the same is done in a careless and negligent manner, it is held while

"the preparation and the adoption of the plans are the exercise of governmental powers, the construction of the building is ministerial, and where it is so negligently done that the building collapses upon the property of another, the municipality is liable."[16]

Fumigating Premises.—A municipal corporation acting through a board of health, which, within the scope of its statutory powers, fumigates premises wherein a person has been sick with a contagious disease, acts in a governmental capacity, is not liable in an action for damages, for negligence of the board of health and its agents, whereby property was destroyed through the careless use of fumigating apparatus while disinfecting premises where a person had been sick with a contagious disease.[17]

Destruction of Property from Sparks of Steam Roller.—Michigan holds that a municipal corporation is not liable for the burning of property of an abutting owner by sparks from a defectively constructed and negligently managed steam roller with which its agents are repairing a street;[18] and Iowa the contrary.[19]

(9) Robinson v. Greenville, 42 O. S. 625.

(10) Howard v. City of Brooklyn, 51 N. Y. Supp.

(11) Custer v. City of New Philadelphia, 20 O. C. C. 177. Affirmed by 65 O. S. 574.

(12) Lafayette v. Rose, 88 Ind. 475; Pierce v. New Bedford, 129 Mass. 534; Toomy v. Albany, 14 N. Y. Supp. 572; Schultz v. Milwaukee, 49 Wis. 254; Weller v. Burlington, 60 Vt. 28.

(13) Roberts v. City of Cincinnati, 5 Am. L. Rec. (Ohio), 74.

(14) Shilling v. Cincinnati, 22 C. C. (N. S. Ohio), 526 Citing; Condict v. Jersey, 46 N. J. L. 157; Haley v. Boston, 191 Mass. 291; Johnson v. Somerville, 195 Mass. 370.

(15) Quill v. The Mayor, 36 App. Div. (N. Y.), 476; Missano v. The Mayor, 160 N. Y. 123; City of Denver v. Porter, 126 Fed. 288.

(16) Etzenberger v. City of Cleveland, 25 C. C. (N. S. Ohio) 303.

(17) West v. Mt. Washington, 20 Dec. (Ohio) 125.

(18) Alberts v. City of Muskegon, 146 Mich. 210, 109 N. W. 262.

(19) McMahon v. Dubuque, 107 Ia. 62, 77 N. W. 517.

The conflict in these cases is said to be due entirely to the fact that in the respective jurisdictions in which the decisions occurred, a different common-law rule exists as to the liability of municipalities, for damages occurring in the construction or repair of their respective streets. Iowa recognizes the rule which prevails in most jurisdictions that the construction and repair of the highways is a corporate and private function, and Michigan that it is a governmental function. Massachusetts seems to agree with Michigan[20] and Vermont,[21] while New York[22] and Colorado[23] support Iowa.

Child Run Over by Ash Cart.—New York by a divided court held, that the municipality was liable when a child was injured by being run over by a horse attached to an ash cart; that it was the duty of the municipality, put upon it by statute to remove the ashes from the streets, and was the exercise of a *legal individual*, as distinguished from its *governmental functions* when it acts as sovereign.[24]

Driver of Dump Cart.—It has been held that removal of sweepings from a street, where the permitting the same to remain might affect the public health, and in the removal the municipality exercises a governmental function, and is not liable for an injury sustained by the driver of a dump cart by reason of the breakage of the axle of a dump cart.[25]

Pedestrian Run Over by Dump Wagon.—For a similar reason it was held that the municipality was not liable when a pedestrian was run over by a wagon engaged in removing waste and refuse matters from the street.[26]

Injury from Act of Police Department.—It is held generally that a municipality is not liable for an injury sustained by a member of the police department, but a court has recently held there is no presumption that the department was engaged in its public duties at the time the accident occurred, and if the municipality wishes to escape responsibility it must plead and show that the police were acting and engaged in some effort to enforce the law at the time the accident occurred.[27]

While upon theory and precedent it may properly be held that in the exercise of governmental function a municipality is not responsible for an injury by its agents to the property or person of another, there is room to challenge the justice of such holding. The municipality chooses its agents; it is the sole judge of their efficiency; has, or should have knowledge of their discreetness. The act the municipality is performing is for the benefit of the public, and there are no good reasons why, if an innocent person should suffer an injury, the public should not bear the burden rather than the individual. Take the case hereto quoted from.[28]

Where an innocent person sitting in his buggy in a public street, where he had a right to be, was injured, why should not the city in justice bear the burden?

Or take the case where the person is sitting in his automobile, and the fire department comes along and runs into his auto, smashes it and takes the owner's life, why should not the public bear this loss, and not the innocent wife who has been widowed and children who have been orphaned?

There may be some cases, such as may occur from mob violence and great conflagrations, where the municipality should not be held liable, but generally there is not much reason in the administration of justice, for the application of any different rule to municipalities, than applies to individuals.

WM. M. ROCKEL.

Springfield, Ohio.

(20) McManus v. Weston, 164 Mass. 263.
(21) Bates v. Rutland, 62 Vt. 178.
(22) 37 N. Y. Supp. 587.
(23) Denver v. Peterson, 5 Col. App. 41, 36 Pac. 1111.
(24) Missanno v. The Mayor, 160 N. Y. 123.
(25) Savannah v. Jordan, 142 Ga. 409.
(26) 142 Ky. 443, 134 S. W. 468.
(27) Jones v. Sioux City, 170 N. W. 445.
(28) Frederick v. City of Columbus, 58 O. S. 538.

NEGLIGENCE—IMPUTABILITY.

COLORADO SPRINGS & I. RY. CO. v. COHUN.

Supreme Court of Colorado. April 7, 1919.

180 Pac. 307.

The negligence of the driver of a conveyance cannot be imputed to a passenger therein.

DENISON, J. This is a suit based on the negligence of the defendant company, plaintiff in error. The plaintiff had a verdict for $5,000.

(1) 1. Norah Cohun, defendant in error and plaintiff below, was riding on the right side of the driver's seat of her husband's motor-truck. Cohun, her husband, sat on the left and drove the truck. They went easterly on Platte avenue in Colorado Springs to its intersection with Institute street, and, in the middle of this intersection the truck collided with an electric street car of the defendant company approaching from the south. The ordinance of Colorado Springs provides that—

"At street intersections the driver of any vehicle shall have the right of way over any other vehicle coming from the driver's left and shall yield the right of way to any other vehicle coming from the driver's right."

Cohun, the driver of the truck, did not see defendant's car until it was within 20 feet of him. In this, under the facts of the case, he was guilty of contributory negligence. Livingston v. Barney, 62 Colo. 528, 163 Pac. 863.

(2) His negligence, however, cannot be imputed to plaintiff. C. & S. Ry. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700; Denver Tramway Co. v. Armstrong, 21 Colo. App. 640, 643, 645, 123 Pac. 136; 88 Cent. Law J. 174.

(3) The exception to the rule against imputed negligence in cases like the present is where the driver is the servant or agent or otherwise under the control of the passenger. The plaintiff's own want of care in such cases is also sometimes inaccurately spoken of as an exception to this rule, but plaintiff's own want of care is, of course, never imputed, but is always effective independently of imputation. A correct statement appears in Virginia Co. v. Gorsuch, 120 Va. 655, 91 S. E. 632, Ann. Cas. 1918B, 838, in Dean v. Penn. R. Co., 129 Pa. 514, 525, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733, and Crescent v. Anderson, 114 Pa. 643, 647, 8 Atl. 379, 60 Am. Rep. 367. See, also, 88 Cent. Law J. 174.

(4) Was plaintiff herself guilty of negligence? She took no care, did not look, and did not see the car at all, though she might have done so, and it is insisted that she ought to have looked and listened and warned her husband. It was her duty to exercise that kind and degree of care that a person of ordinary prudence would exercise under like circumstances, and the court, in instructions 13 and 14, so instructed the jury.

The questions, then, for decision concerning her contributory negligence, were: First, how a woman of ordinary prudence would behave situated as plaintiff was? Second, did plaintiff so behave? These questions are ordinarily for the jury, and the courts cannot interfere unless the jury's answer is so manifestly wrong as not reasonably to be the subject of dispute.

Since plaintiff's negligence, if any, was failure to look or listen, and since her conduct in this respect is undisputed, the jury by their verdict for plaintiff necessarily decided that a woman of ordinary prudence in like circumstances would not have looked or listened.

(5) We are now asked to say that the verdict was wrong because her conduct was negligent as a matter of law, which would be equivalent to saying that a woman of ordinary prudence, under the same circumstances, would have looked or listened, and that that proposition is so manifest as not reasonably to be a subject of dispute. This we cannot say.

2. Defendant argues that negligence on its part was not shown, because when the motorman first saw and was first able to see the truck, the collision was so imminent that he could not stop in time to avoid it. A sufficient answer to this point is that the jury may have believed the plaintiff's witnesses as to the speed of the car or have disbelieved the motorman's story for other reasons.

(6) 3. Counsel for plaintiff in error object to instructions 13 and 21 because they do not consider imputed negligence, and claim that the driver's negligence should be imputed to plaintiff if she herself was negligent. We doubt that, but, even if it should, the jury, as we have shown, found she was not negligent, so we do not see how the company was prejudiced by the instructions.

4. Counsel complains of the use of the words "going upon defendant's track" in instructions 18 and 20. We do not think they were prejudicial.

(7) 5. It is complained that the court erred in modifying instruction 12, requested by defendant, as shown in instruction 22. The requested instruction, after quoting the ordinance, was:

"If you find and believe from a preponderance or greater weight of evidence that a collision occurred between the automobile truck in which the plaintiff was riding and the defendant's street car at the intersection of Platte avenue and Institute street in the city of Colorado Springs, and that the driver of the automobile truck failed to yield the right of way to the motorman in charge of the street car, as provided by said ordinance, and that such failure on the part of the driver of said automobile truck was the proximate cause of said collision, then your verdict should be for the defendant."

To this the court added:

"Unless you further find from the evidence that the defendant was guilty of any of the acts of negligence complained of in the complaint, which prevented the driver of said automobile from complying with said ordinance."

The modification was right, because, if the motorman's negligence prevented Cohun from yielding it would at least be a concurring cause (29 Cyc. 496-498; 37 Cent. Dig. tit. Negligence, §§ 74, 75), and, if so, the failure to yield would not discharge the defendant; and it follows that the instruction as requested was incorrect. The requested instruction was incorrect also because it left to the jury as questions the occurrence of the collision, its place, the position of plaintiff and Cohun's failure to yield the right of way, none of which were in dispute. It is bad practice to leave unquestioned and undisputed matters to the jury, because, while not necessarily reversible error, it leads them to think there is question where there is none, diverts their minds from the real questions, and so lessens the likelihood of a true verdict. Since the faults are in the instruction as requested, the defendant cannot complain of them.

The judgment should be affirmed.

Judgment affirmed.

GARRIGUES, C. J, and SCOTT, J., concur.

NOTE—*Proximate Cause of Injury to One Other Than Driver in an Automobile.*—Since the coming of automobiles into use many decisions have been rendered by the courts on the question of imputable negligence to one in an automobile other than the driver thereof. In 88 Cent. L. J. 174, in an article entitled: "Rights and Duties of Occupant of Automobile Other than Driver," it is said that: "Anyone riding with a driver has the right to some extent to rely upon him to exercise care for the safety of all in the vehicle," and in the article are cited cases where the bounds of this reliance are shown to have been overstepped.

It would seem, therefore, that a more satisfactory way of stating the question would not be, by speaking of imputable negligence, but rather by considering the situation in which such an occupant places himself as constituting or not a link in the chain of causation.

Take, for example, the fact that the driver of an automobile invites a guest to ride with him. It being conceded that the driver generally has the right to extend, and the guest to accept, such an invitation, how does his acceptance make an intervening act in causation, if there is collision between the automobile and some other vehicle the driver of the automobile not being at fault?

But suppose that acceptance of the invitation increases the risk, or is directly contributory to a collision, or lessens the driver's alertness, does prudence by the guest in acceptance, or proper care of himself while a guest, take away the materiality of his presence as a responsible intervening link in the chain of causation, where the driver is at fault?

In Va. Ry. & P. Co. v. Gorsuch, 120 Va. 655, 91 S. E. 632, Ann. Cas. 1918 B, 838, it is stated broadly that "the negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver," and many cases are cited to the proposition, but there is little or no discussion, particularly, however, reference is made to Atlantic, etc., R. Co. v. Grammanger, 95 Va. 625, 29 S. E. 319, which assumes, that if a passenger is rightfully, in so far as the owner and driver is concerned, in an automobile, she is there the same as in any other place, in so far as injury occurs to him from an independent source, the taking her place there not to be considered in the tracing of proximate cause.

One of the cases cited is where the driver of an automobile inflicted injury on a third party. Very rightly it was held that the passenger who had no control over the driver was not responsible. That, however, is not in point on the question I am considering. Anthony v. Kiefner, 96 Kan. 194, 150 Pac. 524, L. R. A. 1915 F. 876, Ann. Cas. 1916 E, 268. Nor is ReadingTp. v. Telfer, 57 Kan. 798, 48 Pac. 134, 57 Am. St. R. 355, for the same reason, or any of the cases where injury is by the driver of the automobile.

What I am looking for are cases where the guest is injured by the fault of another where there is contributory negligence by the driver, just as in the instant case I am attempting to annotate.

In Toledo & O. C. Ry. v. Fippin, 32 Ohio Cir. Ct. Rep. 755, affirmed without opinion in 86 Ohio St. 334, it was ruled that a wife riding with her husband, an experienced driver of horses, had a right to trust her safety to him as the head of a family and if he was at fault it was not attributable to her. But suppose he was suing to recover for himself for loss of his wife? This feature is not discussed, but the court said: "If the pleadings permitted, we should hold that the husband should be excluded from participation in the verdict." This is a situation, too, that is capable of being differentiated from that of a mere stranger to the driver being injured.

In Murray v. Boston Ice Co., 180 Miss. 165, 61 N. E. 1001, a collision case, it was held that if plaintiff, a guest, trusted to his driver he must show he exercised due care. Several later cases were based on due care of plaintiff's driver. Knox v. R. Co., 185 Mass. 602, 71 N. E. 90; Evensen v. R. Co., 187 Mass. 77, 72 N. E. 355. This principle originated in Thorogood v. Bryan, 8 C. B. 115. The Thorogood rule has prevailed in Wisconsin, as see Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568; Prideaux v. Mineral Point, 43 Wis. 513, 28

Am. Rep. 558; Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30. So also in Michigan. L. S. & M. S. R. Co. v. Miller, 25 Mich. 474; Mullen v. Owosso, 100 Mich. 103; 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. R. 436. But the rule has been limited by later decision to adult cases on the principle that as to them the relation of principal and agent exists. Hampel v. Detroit, etc., R. Co., 138 Mich. 1, 100 N. W. 1002, 108 Am. St. R. 275.

In Carlisle v. Sheldon, 38 Vt. 440, the court held as in Thorogood v. Sheldon, though not citing the case. In Pennsylvania also this rule was first adopted, but afterwards was overruled. Dean v. R. Co., 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733, and later cases.

In Schultz v. Old Colony St. R. Co., 193 Mass. 309, 79 N. E. 873, 8 L. R. A (N. S.) 597, 118 Am. St. R. 502, 9 Ann. Cas. 402, it is said: "The unbroken line of authority in all the other states of the union is opposed to this reasoning," and that case abandons former holding in Massachusetts.

The Dean case *supra* carefully limited its change of ruling to cases where injury to a guest was by a public conveyance, the old rule still governing in cases where an injured person was guest of driver of a private conveyance, the reason being that "it better accords with the policy of law to hold the carrier (a public carrier) alone responsible in such instances, as an incentive to care and diligence." See Carlisle v. Brisbane, 113 Pa. 544, 57 Am. Rep. 483. Afterwards Pennsylvania court held that a guest in a private conveyance could recover against the owner of another vehicle with which the one in which she was riding collided, though there was contributory negligence by its driver. Carr v. Easton, 142 Pa. 139, 21 Atl. 822.

There have been exceptions made where there was a joint enterprise in the use of a vehicle, and it seems to me that this being true, it is not a very far stretch to include all passengers in this category. It is at best only a slight circumstance that may create agency, and whether an enterprise be from a business or other standpoint, there is a common will for all to participate in an act, and there is a quasi-agency of each in the acts of one, who is trusted by the others for his own purpose. If a wife rides with her husband or children with their parents, or minors with adults, this might be different. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 166.

Compensation of Attorney—Division of fees for brokerage between seller's broker and purchaser's attorney, with knowledge of both parties.—Acceptance by purchaser's attorney of commission from seller.—Conditions of propriety indicated.

In the opinion of the Committee:

A. Is it proper for the attorney of a purchaser of real estate to ask for and receive a part of the brokerage commission from the principal broker in the transaction, by agreement with the latter, where the attorney, at the request of the purchaser, and with the knowledge of the seller, conducted part of the negotiations resulting in the sale and where both seller and purchaser had full knowledge of the proposed division of brokerage agreed upon between the attorney and the principal broker, and where the attorney receives no other compensation from the purchaser?

B. In the circumstances stated is it proper for the attorney to ask for and receive a brokerage commission from the owner of the property?

ANSWER No. 166.

In the opinion of the Committee, there is no essential impropriety in either of the courses suggested, provided both principals are fully apprised of the facts, and assent thereto. It is desirable, however, that each principal should know that the other so assents, in order to avoid any impression in the mind of either that the other has been overreached by the attorney. The Committee deems it wise, also, to remind attorneys that they should not voluntarily put themselves into positions where the conditions of their compensation may interfere with the full discharge of their duty to their clients.

QUESTION No. 167.

Privileged Communications, Relation to Client, Enemy Government, War—Disclosure of confidential communications upon demand of Attorney-General.—Conditions indicated.

In the opinion of the Committee may an attorney, who was lawfully employed during peace, in behalf of a Government, with which the United States is now at war, now disclose confidential information received in the course of his former employment, upon the demand of the Attorney-General of the State of New York under powers conferred upon him by New York Laws 1917, Chap. 595, Sec. 1?

ANSWER No. 167.

The Committee expresses no opinion as to whether the rights of the enemy government are abrogated by the declaration of war. However, the Committee is of the opinion that before a lawyer should disclose the confidential information, he should assert that it was re-

ceived in confidence, and may then abide the determination of the tribunal or official to whom the solution of the question may be committed by the statute.

CORRESPONDENCE.

DEFECTS IN MILITARY PROCEDURE.

Editor, Central Law Journal:

Some days ago I received from Mr. John H. Wigmore, Judge Advocate of the U. S. Army, a printed letter and also a copy of the printed report of E. H. Crowder, Judge Advocate General; and I also notice your highly commendatory article in your journal of April 25th commending quite flatteringly the action of Mr. Crowder and Mr. Wigmore.

First, I want to disclaim any interest in the purely personal aspect of the controversy which has been engendered between Mr. Ansell, Mr. Crowder and others.

We ought to caution ourselves against being influenced by the flood of arguments which the franking privilege has enabled one side of the controversy to send over the country. I think it is an injustice to one side to have the benefit of the franking privilege and not the other, but the only matter which I wish to speak about is this:

In Mr. Crowder's report on page 49, it is shown that out of 212 cases sent to the Reviewing Authority, 205 of them were changed by the Reviewing Authority; and of 279 sent to the Secretary of War, 273 were changed.

It seems enough to say that any system of justice, whether military or civil, where an actual trial is had, commits errors in 97 per cent of the cases, is a woeful miscarriage of justice for some reason and it calls aloud for correction, and I think we are committing an injustice when we merely eulogize what has been done.

If Mr. Ansell is making a fight on Mr. Crowder, I have no concern in that fight, except I am perfectly willing to take sides when I have been informed of all the facts and the reasons for the action.

I see from the newspapers that the Secretary of War and the Judge Advocate General are preparing a reform of military procedure at least, and if they are doing that, they are confessing imperfections and it seems to me idle to praise everything they have done.

I have practiced in the civil courts for forty-four years, but my knowledge of military trials only goes to the extent of feeling entirely satisfied that the first hearing of a trial of an ordinary soldier is a farce and should be remedied in some way.

Yours very truly,

F. H. PRENDERGAST.

Marshall, Tex.

[We welcome the opportunity presented by Mr. Prendergast's letter to present, as he has done, some of the arguments in favor of Col. Ansell's criticism of military procedure. Editorially, we have inclined to the belief that much of the recent criticisms of the courts-martial have not taken into consideration the different atmosphere and conditions which surround these tribunals, the objectives which they have in view and the exigencies which they have to meet. But we believe in criticism. It furnishes the incentive to all progress and we therefore are inclined to believe that some improvement in military procedure will result from the present discussion.—EDITOR.]

A CORRECTION.

The name of Frederick G. Bromberg, Mobile, Alabama, was accidentally omitted from our International Law List. We request our subscribers to add this name to their list. Mr. Bromberg is one of the leading lawyers of Mobile.

HUMOR OF THE LAW.

A high school student in a certain eastern city has his own ideas as to the cause of the death of Julius Caesar.

When his teacher asked: "How did the mighty Caesar meet his death?"

"Too many Roman punches," was the reply.

"What is you age, madam?" asked the judge.

"My age?" said the woman in the witness box. "I have just turned 24."

"Just turned 24, have you?" said his honor. "I'm glad to see you are truthful about your age. Twenty-four turned is 42. Proceed, Mr. Prosecutor."—St. Louis Star.

A well known New Orleans lawyer entered the office of one of the daily papers in the City Care Forgot. The editor remarked, "So next Wednesday's your tenth anniversary. All right; I'll announce that Mr. and Mrs. Knagg have been married ten happy years."

Knagg—"Better just say we've been married ten years, about two of 'em happy."—The Lawyer and Banker.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Assignments**—Specific Fraud.—In order that a draft or order may operate as an equitable assignment of moneys belonging to drawer in hands of drawee, it must be drawn against a specific fund or debt with such particularity as will clearly show the intention of parties to charge special fund.—Soppe v. Mechaley, Neb., 172 N. W. 35.

2. **Attachment**—Forthcoming Bond.—To recover on a forthcoming bond given by claimant in attachment, there must have been a breach of the bond, and there could not be a breach where there never was a fi. fa. in the attachment case, nor a judgment fi. fa. in claim case.—Bowden v. Scott, Ga., 99 S. E. 140.

3. **Auctions and Auctioneers**—Memorandum.—The agency of an auctioneer, with general authority to carry out the sale, for the vendor does not end with the sale, as does his agency for the purchaser; and, unless revoked, he may bind the vendor by a memorandum signed within a reasonable time.—Martin v. Mathis, Ky., 211 S. W. 198.

4. **Bankruptcy**—Equitable Lien.—Under the law of New York, by which one corporation may transfer all its property to another, but subject to objecting creditors' rights or "equitable liens" therein, judgment creditors of a corporation, which transfers its property, all in New York, to another corporation, although both are foreign to that state, may follow such property in the hands of the trustee in bankruptcy of the transferee.—In re American Candy Mfg. Co., U. S. C. C. A., 256 Fed. 87.

5. ——Insolvency.—In suit by trustee in bankruptcy to subject land formerly owned by bankrupt's father to payment of amounts invested by bankrupt in improvements thereon for the purpose of defrauding creditors, whether bankrupt was insolvent at the time of making improvements held for the jury.—Garland v. Arrowood, N. C., 99 S. E. 100.

6. **Banks and Banking**—Pass Book.—A "passbook" issued by a savings bank is the record of the customers' account, and its production authorizes control of the deposit.—Wade v. Edwards, Ga., 99 S. E. 160.

7. **Bills and Notes**—Indorsement.—An assignment by a holder of a negotiable note written on the back thereof without limitation, to which a guaranty of payment is added, is a commercial indorsement.—E. D. Fisher Lumber & Coal Co. v. Robbins, Kan., 180 Pac. 264.

8. **Brokers**—Finding Purchaser.—Plaintiff broker was not entitled to compensation unless he found a person able and willing to purchase upon the terms which he was authorized to sell.—Bleiweiss v. McCurdy, Wash., 180 Pac. 403.

9. **Carriers of Passengers**—Attempt at Rescue.—That plaintiff's companion came into danger because she was negligent as well as the motorman in approaching a crossing where cars usually stopped did not necessarily defeat plaintiff's recovery for injury when struck by car while attempting to rescue her companion.—Draves v. Minneapolis & St. P. Suburban R. Co., Minn., 172 N. W. 128.

10. ——Res Ipsa Loquitur.—Where a railroad's bed, equipment, train, etc., are shown to have been under management of road or its servants, and a derailment, injuring a passenger, is such as in ordinary course does not happen if those in charge use proper care, a presumption of negligence arises.—Texas & P. Ry. Co. v. Stivers, Tex., 211 S. W. 319.

11. ——Rules of Carrier.—Carrier must provide reasonable means by which passengers may acquaint themselves with its rules.—Union Traction Co. of Indiana v. Smith, Ind., 123 N. E. 4.

12. **Champerty and Maintenance**—Attorney.—Where an attorney's contract of employment is champertous, it is void.—Mytton v. Missouri Pac. R. Co., Mo., 211 S. W. 111.

13. **Confusion of Goods**—Where a trustee sells for a lump sum goods of the bankrupt, some of which are within a mortgage, although some, not identified, may not be, by the law of New York, the mortgagee is entitled to the entire proceeds, on the principle of confusion of goods.—In re F. & D. Co., U. S. C. C. A., 256 Fed. 73.

14. **Conspiracy**—Joint Tortfeasors.—In an action on case for conspiracy, the conspiracy is not the gravamen of the charge, but may be pleaded and proved as aggravating the wrong complained of and enabling plaintiff to recover in one action, against all as joint tort-feasors.—National Bank of Savannah v. Evans, Ga., 99 S. E. 123.

15.——Joint Tort-feasors.—Parties to an unlawful agreement to defraud are liable as joint tort-feasors to extent of damage done as result of the conspiracy, the liability of a particular conspirator not depending upon the extent to which he profited by the conspiracy, or his activity in its promotion.—Wilson v. Davis, Ark., 211 S. W. 152.

16. **Contracts**—Advantage of Own Wrong.—One who impedes the performance of a contract by another cannot take advantage of his own wrong to prevent a recovery.—Kress House Moving Co. v. George Hogg Co., Pa., 106 Atl. 351.

17.——Forfeiture.—Generally the right to forfeit a contract exists only in favor of a party who is not himself in default.—Howard County v. Pesha, Neb., 172 N. W. 55.

18.——Lex Fori.—Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made.—Keasler v. Mutual Life Ins. Co. of New York, N. C., 99 S. E. 97.

19.——Meeting of Minds.—The minds of the parties to a contract must meet upon the essential contents thereof.—Laney v. Ricardo, Wis., 172 N. W. 141.

20.——Moral Obligation.—A moral obligation does not suffice for a consideration unless it was once a legal obligation.—People v. Porter, Ill., 123 N. E. 59.

21.——Proposal.—A party who makes a proposal to another to be answered by return mail, in absence of a revocation, holds himself ready and willing to abide by it until acceptance or rejection can reach him by return mail.—Allen v. Wolf River Lumber Co., Wis., 172 N. W. 158.

22. **Corporations**—Charter Right.—Where Legislature provides that state officer shall administer affairs of a corporation and settle with its creditors on its insolvency, such a condition is a charter right which follows corporation wherever it goes.—Kinsler v. Casualty Co. of America, Neb., 172 N. W. 33.

23.——Manager.—One advertised by mining stock brokers as the manager of their local branch has implied authority to retain for payment of assessments and resale any certificate of stock purchased through him, since "manager" implies one to whom the affairs of the principal have been committed, and one dealing with him may assume that his acts were authorized.—Sullivan v. Evans-Morris-Whitney Co., Utah, 180 Pac. 435.

24.——Receivership.—All costs incurred by reason of receivership of a corporation, including the receiver's salary, are taxable against the plaintiff and his sureties where the receivership was improperly granted.—Hook v. Payne, Tex., 211 S. W. 280.

25.——Withdrawal of Assets.—Evidence that corporation's stockholders all consented to a division of its surplus among certain stockholders, that then existing creditors had all been paid, and that company continued business for some five years, held not to sustain a finding that the withdrawal defeated corporation's creditors and future stockholders.—Freeman v. Rogers White Lime Co., Ark., 211 S. W. 146.

26. **Criminal Law**—Circumstantial Evidence.—The law does not require that the evidence, independently of that of an accomplice, should establish guilt, but only that there should be criminative facts proved which tend to connect accused definitely and immediately with the commission of the offense.—Meredith v. State, Tex., 211 S. W. 227.

27.——Evidence of Perpetration by Another.—One accused of crime may show that another person committed the offense with which he is charged, where the guilt of such other would be consistent with the innocence of accused, but the proof must be by competent evidence.—Walsh v. State, Tex., 211 S. W. 241.

28.——Intent.—One who intentionally and knowingly commits a criminal act cannot complain that he did not intend to commit the crime.—Mansur v. Lentz, Mo., 211 S. W. 97.

29.——Larceny.—Larceny is a "continuing offense," and, if property is stolen in one county **and taken** by thief into another county, he is guilty of a new caption and asportation in latter county.—State v. Meeks, N. M., 180 Pac. 295.

30.——Newly Discovered Evidence.—Newly discovered evidence to warrant a new trial must appear to be such as would probably change the result if a new trial were granted.—People v. Wright, Ill., 123 N. E. 64.

31.——Res Gestae.—Declarations of a witness as he was leaving the community to the effect that he was going to enlist in the army was of the res gestae of his leaving.—Hardaman v. State, Ala., 81 So. 449.

32. **Damages** — Special Damages. — Where plaintiff is not entitled to recover the special damages which alone are sued for, there can be no recovery of general or nominal damages.—Prince v. Evans, Ga., 99 S. E. 132.

33. **Deeds**—Delivery.—Recordation of deeds raises presumption of delivery.—Campbell v. Genshlea, Cal., 180 Pac. 336.

34.——Nominal Consideration.—Where aged woman residing with her son-in-law made to him on nominal consideration deeds to nearly all her property except small gifts to her daughter and grandchildren, in suit to set aside the deeds on the ground they were not the voluntary acts of the grantor, the burden was on the son-in-law and daughter to prove the deeds were her voluntary act, made without undue influence.—Hammersley v. Bell, Md., 106 Atl. 339.

35. **Easements**—Contiguous Owners.—Where owners of contiguous lots had a right to place gates across a passway over the lots, grantees of lots would also have the same right.—Bard v. Batsell, Ky., 211 S. W. 185.

36.——Non-user.—Although plaintiff and his predecessors have neglected for 25 years to exercise their right to lay a pipe line upon a right of way, they have not lost such right, for an easement founded upon a grant cannot be lost by mere non-user, no matter how long that non-user may continue, and it may be lost by abandonment only when the intention to abandon clearly appears.—Parker v. Swett, Cal., 180 Pac. 351.

37.——Right of Way.—Deed to plaintiffs, reserving to grantor, as an easement in favor of the tract owned by him, perpetual right of way over and across strip of land conveyed, constituting northerly 30 feet across width of his tract, constituted and reserved only easement appurtenant to tract of which strip was the northerly portion, and not an easement in gross. —Nilson v. Wahlstrom, Cal., 180 Pac. 358.

38. **Election of Remedies**—Statutory Office.—The failure of a civil service officer to claim damages for a wrongful removal in the mandamus proceeding by which he was reinstated, as authorized by Code Civ. Proc. § 2088, is not a waiver of his right to such damages, but he can recover them by separate actions.—McGraw v. Gresser, N. Y., 123 N. E. 84, 226 N. Y. 57.

39. **Eminent Domain**—Abutting Owners.—In the absence of some statute, the owner of property abutting on a street cannot claim damages for lawful change of grade in the highway.—New York Municipal Ry. Corporation v. Weber, N. Y., 123 N. E. 68, 226 N. Y. 70.

40.——Artificial Drain.—That an artificial drain is to be constructed enlarging the channel of a creek and making it necessary to remove a railroad's embankment at the channel would not be a taking of its property without just compensation.—Dettmer v. Illinois Terminal R. Co., Ill., 123 N. E. 37.

41. **Estoppel**—Ignorance of Fact.—It can seldom be an answer to an estoppel founded upon contract, unlike estoppel by conduct, that the party to be estopped acted in ignorance of the facts and under mistake.—McFarland v. McFarland, Mo., 211 S. W. 23.

42.——Insufficient Deed.—Where grantee, in deed insufficiently describing the lands, by the consent of the grantor is permitted to take possession of premises within general terms of description, and occupy and make permanent improvements upon them, grantor will be estopped to urge uncertainty of description, and equity will compel execution of deed properly describing lands intended.—Chicago & A. R. Co. v. Langer, Ill., 123 N. E. 61.

43. **Evidence**—Declarations Out of Court.—Declarations and statements of a party made out of court may be proven, not merely to impeach the party, but as substantial proof of the fact in controversy.—Ross v. Felter, Ind., 123 N. E. 20.

44. **Fraud**—Superior Knowledge.—Where corporation officers have superior knowledge as to facts affecting the value of stock, and where an investigation would be required to discover the truth, representations of value of corporate assets and stock which are neecssarily speculative may be actionable.—Redfield v. Lamb, Neb., 172 N. W. 48.

45. **Frauds, Statute of**—Termination Within One Year.—A parol contract, which by its terms may be terminated at the end of six months at the option of either party, is not within the statute of frauds of New York, as one that "by its terms is not to be performed within one year."—Standard Bitulithic Co. v. Curran, U. S. C. C. A., 256 Fed. 68.

46. **Fraudulent Conveyances**—Bulk Sale Statute.—A sale in bulk, within Bulk Sales Law and made in violation of its provisions, is fraudulent, without regard to the actual intention of the parties.—Brown Shoe Co. v. Sacks, Mo., 211 S. W. 133.

47.——Parties to Action.—Judgment debtor, having no longer any interest in property fraudulently transferred by him, is not a necessary party to suit by judgment creditor to set aside the transfer and subject the property to the judgment.—Bank of Commerce & Trusts of Richmond, Va., v. McArthur, U. S. C. C. A., 256 Fed. 84.

48. **Garnishment**—Presumption of Death.—Where beneficiary named in benefit certificate, under agreement made with insurer after holder of certificate had disappeared and was presumptively dead, had a contingent right in amount of certificate paid into bank by insurer, subject to be defeated if insurer could prove holder of certificate was alive, such contingent right of beneficiary was subject to garnishment, by order merely continuing proceeding subject to further orders of court.—Ottumwa Nat. Bank v. Norfolk, Iowa, 172 N. W. 3.

49. **Homicide**—Dying Declarations.—For dying declarations to be admissible in a prosecution for homicide, such declarations must be made by a person in the article of death, who is conscious of his condition, as to the cause of death and the person who killed him.—Fitzpatrick v. State, Ga., 99 S. E. 128.

50.——Specific Malice.—To constitute murder, it is not essential that any specific malice by the killer be directed toward the person killed. —Banks v. State, Tex., 211 S. W. 217.

51. **Husband and Wife**—Coverture.—Property acquired by husband and wife during coverture is presumed to be community property.—Brucker v. De Hart, Wash., 180 Pac. 397.

52. **Infants**—Ratification.—If infant grantees, who executed notes to the grantor after they became of age, ratified the notes, or refused to agree to a cancellation of the deed, a vendor's lien would be enforceable against the land as to them.—Wright v. Buchanan, Ill., 123 N. E. 53.

53. **Injunction**—Penal Offense.—Equity will not restrain a prosecution for the violation of an alleged invalid penal ordinance forbidding the operation of automobiles with cut-out open. —Campbell v. City of Jefferson, Ga., 99 S. E. 124.

54.——Temporary Order.—Sess. Laws 1911, c. 70, § 13, authorizes a trial court at commencement of an action to issue a temporary order of injunction.—Martindale v. State, Okla., 180 Pac. 385.

55. **Insurance**—Forfeiture.—Where insurance company reserves the power in its policy to forfeit for non-payment of assessments and dues, it must, in order to avail itself of that drastic provision, allege and prove that the aggregate amount demanded of the policy holder was legal and correct, and that upon due notice the insured failed to make payment thereof.—Young v. Hartford Life Ins. Co., Mo., 211 S. W. 1.

56.——Forfeiture.—Rules of waiver of forfeiture are as applicable to society insurance companies or associations as to any ordinary insurance company, and such a society through its proper officers can waive a strict compliance with the by-laws.—Ceresia v. St. Giuseppe Mut. Aid Working Men's Ass'n, Mo., 211 S. W. 81.

57.——Misrepresentation.—A false answer by an applicant for insurance that he had never been refused insurance, if only a misrepresentation, is material to the risk.—Western Life Indemnity Co. v. Couch, Ind., 123 N. E. 11.

58.——Report of Accident.—Where an apparently trivial mishap occurred, the assured under an accident liability policy was not required to regard it as an accident of which notice should be given immediately to the insurer, although it afterwards resulted in serious injury.—Melcher v. Ocean Accident & Guarantee Corporation, Limited, N. Y., 123 N. E. 81, 226 N. Y. 51.

59.——Unconditional Sole Interest.—Policy of fire insurance providing that it should be void if insured's interest was other than unconditional sole interest, or if buildings insured were not on ground owned by insured in fee simple, was void if insured was not unconditional owner of property covered by policy, together with land on which buildings were situated.—Blackstock v. Jefferson Ins. Agency, Ga., 99 S. E. 142.

60. **Judgment**—Confession of.—A warrant of attorney given as security to a creditor and accompanying a note confers a valid power, and authorizes a confession of judgment in any court of competent jurisdiction in an action on note.—First Nat. Bank v. Baker, N. M., 180 Pac. 291.

61.——Former Adjudication.—An order dismissing an action on plaintiff's motion, purporting to be a judgment nil capiat, is ambiguous on its face, and will not sustain a plea of former adjudication.—Toney v. Sandy Ridge Coal & Coke Co., W. Va., 99 S. E. 178.

62. **Libel and Slander**—Office in Employment.—A showing that a teacher had a vexatious and perverse temper, ill treated her associates, and antagonize superiors is justification for a printed statement that she was incompetent, since incompetency is not limited to lack of mental equipment and knowledge or ability to teach, but means a lack of fitness for the duties of the office.—Cafferty v. Southern Tier Pub. Co., N. Y., 123 N. E. 76, 226 N. Y. 87.

63.——Presumption of Damage.—Where alleged slanderous words charging the commission of a crime were actionable per se, the law presumes that actual damages necessarily resulted therefrom.—Winans v. Chapman, Kan., 180 Pac. 266.

64. **Licenses**—Strict Construction.—Laws imposing license tax, and providing a penalty for doing business without a license, are penal, and as such should be strictly construed.—Texas Co. v. Amos. Fla., 81 So. 471.

65. **Limitation of Actions**—Part Payment.—The effect of part payment on note before statute of limitations has run is to continue the old obligation which is covered by the status of the parties at the time the contract was made.—Enwright v. Griffith, Wis., 172 N. W. 156.

66.——Plea.—If it does not appear from the face of the petition that suit is barred, the statute must be pleaded by answer.—American Radiator Co. v. Connor Plumbing & Heating Co., Mo., 211 S. W. 56.

67. **Malicious Prosecution**—Punitive Damages.—In action for malicious prosecution, defendant may be asked the amount of his estate, where the plaintiff's claim includes punitive damages.—Aland v. Pyle, Pa., 106 Atl. 349.

68. **Master and Servant**—Guarding Machinery.—Employer was only required to furnish such guard on buzz planer as would protect operator from dangers and injuries which could reasonably have been anticipated when guard was adjusted with reasonable care by operator.—Amen v. Standard Steel Car Co., Ind., 123 N. E. 7.

69.——Warning.—It is the master's duty to warn experienced servant of a latent or concealed danger or defect, or of conditions suddenly changed so as to endanger servant's safety, where master knows or should have known of such dangerous condition, and servant has no knowledge thereof.—Macky v. Bingham New Haven Copper & Gold Mining Co., Utah, 180 Pac. 416.

70. **Mortgages** — Assignment. — Assignee of note and mortgage in good faith, for valuable consideration, before maturity, and without knowledge or notice of any infirmities, is entitled to the protection of the law.—Bank of Wayland v. Staidley, Iowa, 172 N. W. 9.

71.——Deficiency Judgment.—That a deficiency judgment was rendered against defendant in a mortgage foreclosure action, though complaint alleged no facts showing a right thereto, did not invalidate the judgment for want of jurisdiction; such defect not going to the jurisdiction of a court.—Gillespie v. Fender, Cal., 180 Pac. 332.

72. **Municipal Corporations** — Ratification. — Generally a contract which is within the scope of the powers of a municipal corporation or public body, but which, owing to some irregularity, is not binding upon the corporation or body, may be ratified.—Hermance v. Public School Dist. No. 2 of Maricopa County, Ariz., 180 Pac. 442.

73. **Negligence**—Defective Apparatus.—Where both an apparatus and its operation are in the control of defendant, and an accident happens which could not ordinarily happen except by reason of defective apparatus or negligent operation by defendant's servants, the fact of the accident might be sufficient of itself to justify a finding of defect in the apparatus or negligence in its operation.—Georgia Casualty Co. v. American Milling Co., Wis., 172 N. W. 148.

74.——Imputability.—The negligence of the driver is not imputable to the passenger because the passenger suggested the ride and gave directions as to the course.—Cram v. City of Des Moines, Iowa, 172 N. W. 23.

75.——Imputability.—The negligence of the driver of a conveyance cannot be imputed to a passenger therein.—Colorado Springs & I. Ry. Co. v. Cohun, Colo, 180 Pac. 307.

76. **Parent and Child**—Indigent Parent.—In the absence of statute, there is no obligation that a child who is able to maintain and care for an indigent and helpless parent must do so, however old and needy the parent may be.—In re Erickson, Kan., 180 Pac. 263.

77. **Partnership**—Agency.—One partner cannot bind the partnership in a contract when the other contracting party is fairly and fully informed that there are other partners interested in the transaction, and that they object and will not assent thereto.—Cox v. Denton, Kan., 180 Pac. 261.

78.——Fraud.—A partner's sale of his interest to his co-partner on a consideration determined by condition of partnership as ascertained from a settlement will not be set aside unless it appears to have been the result of fraud, accident, or mistake.—Benedetto v. Di Bacco, W. Va., 99 S. E. 170.

79. **Payment**—Presumption of.—Where claims have been allowed against an estate for more than 20 years, the presumption that they have been satisfied will defeat a recovery on them, unless rebutted by proof.—Howe v. Brown, Ill., 123 N. E. 46.

80. **Principal and Agent**—Implied Authority.—Owner's agent who delivered seed to a cropper, entitled by his contract to seed of good quality, had no implied authority to bind owner by representation or warranty that the obviously bad seed was good.—Wavra v. Karr, Minn., 172 N. W. 118.

81.——Ostensible Authority.—Principal is never charged with consequences of agent's misconduct in violating his instructions except for the protection of some third person who has been misled by a reliance on an ostensible authority of the agent.—City of Seaside v. Randles, Ore., 180 Pac. 319.

82. **Principal and Surety**—Release of Surety.—If payee under a valid agreement with principal and without consent of surety extends time of maturity, the surety will be released.—Duckett v. Martin, Ga., 99 S. E. 151.

83. **Quieting Title**—Disclaimer.—Where the court granted a non-suit in favor of all defendants, and one defendant had expressly disclaimed any interest in the rights concerning title sought to be quieted, non-suit as to him was error.—Parker v. Swett, Cal., 180 Pac. 351.

84. **Sales**—Entire Contract.—A contract for the purchase of fertilizer bags, to be delivered in specified numbers per month, held an entire and not a severable contract.—Neely v. Willard Bag & Mfg. Co., Ga., 99 S. E. 167.

85. **Vendor and Purchaser**—Election of Remedy.—Where negotiable notes are made evidencing payments stipulated in contract for deed for land, the vendor cannot both cancel and rescind such contract and enforce payment upon notes.—Earley v. France, N. D., 172 N. W. 73.

86. **Wills**—Executory Devise.—An executory devise is such a limitation of a future interest in lands or personal chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law.—Dean v. Crews, Fla., 81 So. 479.

87.——Heirs and Issue.—Where a gift is made to members of a class described as "heirs" or "issue," grandchildren and their descendants will not be allowed to compete with their parents, unless such was testator's intention.—Ernst v. Rivers, Mass., 123 N. E. 93.